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In the Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES, PETITIONER

v.

IRENE BLUMER

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN, DISTRICT IV

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Through the Medicaid program, 42 U.S.C. 1396 *et seq.*, the federal government provides partial funding to the States for the provision of medical services to eligible needy persons. This case arises out of the Medicaid program's "spousal impoverishment" provisions, 42 U.S.C. 1396r-5 (1994 & Supp. IV 1998), which establish special rules for determining the eligibility of a married individual who is institutionalized (in a nursing home or otherwise), but has a spouse (the "community spouse") who is not. In particular, those provisions govern the allocation of income and resources between such spouses for purposes of determining Medicaid eligibility. The question presented is:

Whether, in a "fair hearing" proceeding to consider whether to raise the community spouse's resource allowance pursuant to 42 U.S.C. 1396r-5(e), Wisconsin's "income first" requirement, Wis. Stat. Ann. § 49.455(8)(d) (West 1997), which treats income otherwise attributable to the institutionalized spouse as available to the community spouse to meet that spouse's minimum monthly maintenance needs, is consistent with the federal statute, 42 U.S.C. 1396r-5(e)(2)(C).

TABLE OF CONTENTS

	Page
Statement	1
Discussion	9
Conclusion	20
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Aluminum Co. of Am. v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380 (1984)	15
Atkins v. *Rivera*, 477 U.S. 154 (1986)	1
Batterton v. *Francis*, 432 U.S. 416 (1977)	10, 16, 18, 19, 20
Chambers v. *Ohio Dep't of Human Servs.*, 145 F.3d 793 (6th Cir.), cert. denied, 525 U.S. 964 (1998)	3, 7, 11, 12, 14
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)	13, 16
Christensen v. *Harris County*, 529 U.S. 576 (2000)	17
Cleary v. *Waldman*, 167 F.3d 801 (3d Cir.), cert. denied, 528 U.S. 870 (1999)	7, 11
Davidson v. *Francis*, 409 U.S. 904 (1972)	19
Friedman v. *Berger*, 547 F.2d 724 (2d Cir. 1976), cert. denied, 430 U.S. 984 (1977)	15
Golf v. *New York State Dep't of Soc. Servs.*, 697 N.E.2d 555 (N.Y. 1998)	11
Harris v. *McRae*, 448 U.S. 297 (1980)	1
Heckler v. *Chaney*, 470 U.S. 821 (1985)	18
Lincoln v. *Vigil*, 508 U.S. 182 (1993)	18
Schweiker v. *Gray Panthers*, 453 U.S. 34 (1981)	1, 16
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944)	17, 18
Thomas v. *Commissioner of the Div. of Med. Assistance*, 682 N.E.2d 874 (Mass. 1997)	11

Statutes and regulation: Page

Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683:
- 42 U.S.C. 1396r-5 (1994 & Supp. IV 1998) 2, 10
- 42 U.S.C. 1396r-5(a)(1) 3
- 42 U.S.C. 1396r-5(b) 4
- 42 U.S.C. 1396r-5(b)(1) 3, 12
- 42 U.S.C. 1396r-5(b)(2) 4
- 42 U.S.C. 1396r-5(d) 4
- 42 U.S.C. 1396r-5(d)(1)(B) 17
- 42 U.S.C. 1396r-5(d)(2) 4, 13
- 42 U.S.C. 1396r-5(d)(3) 4
- 42 U.S.C. 1396r-5(d)(4) 4
- 42 U.S.C. 1396r-5(e)(2)(C) 6, 7, 8, 12, 17
- 42 U.S.C. 1396r-5(f)(2)(A) 5

Social Security Act, Pub. L. No. 89-97, Tit. XIX, 79 Stat. 343 (42 U.S.C. 1396 *et seq.*) 1
- 42 U.S.C. 1396a(a)(17) 1, 2, 13, 15, 16, 19
- 42 U.S.C. 1396a(a)(17)(B) 16

42 U.S.C. 607(a) (1994) 16

Wis. Stat. Ann. § 49.455(8)(d) (West 1997) 7

42 C.F.R. 435.700 *et seq.* (1980) 2

Miscellaneous:

H.R. Conf. Rep. No. 661, 100th Cong., 2d Sess. (1988) 2, 14

H.R. Rep. No. 105, 100th Cong., 1st Sess. Pt. 2 (1987) 2

65 Fed. Reg. (Nov. 30, 2000):
- p. 73,838 9
- p. 73,839 9

Peter L. Strauss, *One Hundred Fifth Cases Per Year*, 87 Colum. L. Rev. 1093 (1987) 18

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Medicaid program, established by Title XIX of the Social Security Act, Pub. L. No. 89-97, 79 Stat. 343 (42 U.S.C. 1396 *et seq.*) "provid[es] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae*, 448 U.S. 297, 301 (1980). States that participate in ~~the~~ Medicaid program agree to provide coverage and benefits in conformity with federal guidelines. *Atkins* v. *Rivera*, 477 U.S. 154, 156 (1986). "Each participating State develops a plan containing 'reasonable standards . . . for determining eligibility for and the extent of medical assistance.'" *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 36 (1981) (quoting 42 U.S.C. 1396a(a)(17)). The state standards must "provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the

Secretary, available to the applicant or recipient." 42 U.S.C. 1396a(a)(17).

Income and resource calculations for married persons have proved to be a matter of great complexity, particularly when one of the spouses (referred to as the "institutionalized spouse") is cared for in an institutional setting, such as a nursing home, but the other spouse (referred to as the "community spouse") is not. Until 1989, the rules governing the Medicaid eligibility of institutionalized individuals did not offer much protection for the needs of their community spouses. Instead, Medicaid eligibility was calculated as if most or all of the couple's income and resources could be dedicated exclusively to the cost of caring for the institutionalized spouse. With respect to income, Medicaid regulations initially permitted some income to be protected for the needs of a community spouse and dependents, but the amount of income that could be so protected was very small. See 42 C.F.R. 435.700 *et seq.* (1980). As a result, the spouse in the community was sometimes left with income below the poverty level. See H.R. Conf. Rep. No. 661, 100th Cong., 2d Sess. 258 (1988). With respect to resources, a similar rule prevailed. The couple's joint assets (subject to a quite limited exclusion) and any property owned solely by the institutionalized spouse were considered available for the care of the institutionalized spouse. Almost all of a married couple's assets therefore had to be depleted before the institutionalized spouse would qualify for Medicaid. The net effect of those requirements in some cases was the "pauperization" of the community spouse. H.R. Rep. No. 105, 100th Cong., 1st Sess. Pt. 2, at 65 (1987).

Congress attempted to alleviate that "spousal impoverishment" hardship in the Medicare Catastrophic Coverage Act of 1988, 42 U.S.C. 1396r-5 (1994 & Supp. IV 1998). In particular, Congress "attempted to strike a balance between preventing impoverishment of the community spouse by excluding minimum amounts of resources and income for

that spouse from eligibility considerations, and preventing a financially solvent institutionalized spouse from receiving Medicaid benefits by ensuring that income was not completely transferred to the community spouse." *Chambers* v. *Ohio Dep't of Human Servs.*, 145 F.3d 793, 798 (6th Cir.), cert. denied, 525 U.S. 964 (1998). That balance is achieved through a complex set of requirements and exclusions that a State must employ when allocating income and resources between community and institutionalized spouses, both when the initial eligibility determination is made, and later in post-eligibility determinations. The spousal impoverishment provisions "supersede any other provision" of the Medicaid statute "which is inconsistent with them." 42 U.S.C. 1396r-5(a)(1).

With respect to the allocation of income, the spousal impoverishment provisions impose only a single rule applicable to initial eligibility determinations. "During any month in which an institutionalized spouse is in the institution," the statute provides, "no income of the community spouse shall be deemed available to the institutionalized spouse" (subject to certain exceptions). 42 U.S.C. 1396r-5(b)(1). Thus, subsection (b)(1) establishes a special rule that protects the income of the community spouse by excluding that income from consideration when determining whether the institutionalized spouse is eligible for Medicaid. That prohibition represents a departure from prior practice, under which many state Medicaid plans, consistent with the Secretary's regulations, treated the assets and income of *either* spouse as available to the other. Subsection (b)(1), however, does not address the extent to which the institutionalized spouse's income may be considered available to meet the needs of the community spouse.

With respect to income attribution after the initial eligibility determination is made, the spousal impoverishment provisions provide more extensive guidance and requirements. For example, subsection (b)(2) provides that, if payment of

income is made solely in the name of one spouse, that income is generally treated as available *only* to that spouse. See 42 U.S.C. 1396r-5(b)(2). Subsection (d) provides a number of exceptions to that rule, which are generally designed to ensure that the community spouse has sufficient income to meet his or her basic monthly needs. In particular, it provides for the establishment of "minimum monthly maintenance needs allowance" or "MMMNA" for each community spouse. 42 U.S.C. 1396r-5(d). The community spouse's minimum monthly maintenance needs allowance is set at a level that is much higher than the official federal poverty level.[1] Once income is allocated between the spouses according to the general rules in subsection (b), the income allocated to the community spouse is compared to the community spouse's minimum monthly maintenance needs allowance. If the community spouse's income is less than the minimum monthly maintenance needs allowance, the amount of the shortfall is deducted from the income of the institutionalized spouse that would otherwise be considered available for the care of the institutionalized spouse. 42 U.S.C. 1396r-5(d)(2). The amount of that deduction is referred to as the "community spouse monthly income allowance." *Ibid.*

The deduction of the community spouse monthly income allowance, in effect, prevents money the community spouse requires to meet basic needs from being considered available for the care of the institutionalized spouse. The deduction in some cases permits individuals to remain Medicaid eligible and in others permits Medicaid to defray a greater portion of the costs of institutionalized care than it otherwise would; the greater Medicaid payments for care of the institutionalized spouse free up income to meet the minimum needs of

[1] The minimum monthly maintenance needs allowance for the community spouse is set at 150% of the poverty line for a couple, plus an "excess shelter allowance" reflecting certain expenses to the extent that those expenses consume more than 30% of that figure. 42 U.S.C. 1396r-5(d)(3) and (4).

the community spouse. The community spouse monthly income allowance thus ensures that the community spouse's basic monthly maintenance needs can be met *before* income is considered available for the care of the institutionalized spouse.

With respect to the attribution of resources (*i.e.*, assets) between spouses, the statute provides extensive rules for both initial and post-eligibility decisions. For initial eligibility determinations, each spouse's share of resources is calculated as of the beginning of the period of institutionalization. At that time, all of the couple's resources are tallied together, and one half of the total value is allocated to each spouse. Often, most of the resources allocated to the institutionalized spouse must be exhausted before the institutionalized spouse is eligible for Medicaid. In contrast, the community spouse's share is protected from complete exhaustion. In particular, the community spouse's resources are not considered available for the care of the institutionalized spouse—and the institutionalized spouse, once Medicaid eligible, remains eligible—so long as the community spouse's share does not exceed the "community spouse resource allowance" or "CSRA." The CSRA thus limits the extent to which the community spouse must exhaust resources before the institutionalized spouse becomes eligible for Medicaid. The CSRA is the greatest of (i) $12,000 or a State standard up to $60,000 (indexed for inflation); (ii) the lesser of the spouse's resource share (approximately one-half of the spouses' pooled resources) or $60,000 (indexed for inflation); (iii) the amount set at a "fair hearing" under 42 U.S.C. 1396r-5(e)(2); or (iv) the amount transferred pursuant to a court order. 42 U.S.C. 1396r-5(f)(2)(A).

This case concerns the provisions of the Medicaid statute which permit the CSRA to be increased, through the "fair hearing" procedure, when the community spouse's income is less than that spouse's minimum monthly maintenance needs allowance. Permitting the community spouse to obtain a

larger CSRA can give the community spouse additional income-generating resources to meet minimum monthly needs; absent an increase in the CSRA, the resources would be considered available to the institutionalized spouse and might have to be exhausted before the institutionalized spouse would be Medicaid eligible. The key provision is Section 1396r-5(e)(2)(C), entitled "Revision of community spouse resource allowance." It provides:

> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance * * * , an amount adequate to provide such a minimum monthly maintenance needs allowance.

The question in this case concerns what sources of income may be considered when determining whether to adjust, or the extent of any adjustment to, the CSRA under that provision.

2. After enactment of the 1988 spousal impoverishment provisions, a divergence in practice arose among the States with respect to the adjustment of the CSRA under subsection (e)(2)(C). Under the so-called "income-first" method, income of an institutionalized spouse is allocated to the community spouse for purposes of determining the extent to which the community spouse has sufficient income to meet minimum monthly maintenance needs. Under that method, the CSRA is not increased unless the community spouse's income will not reach his or her minimum monthly maintenance needs allowance *after* taking into account any income available from the institutionalized spouse. In contrast, under the "resource-first" approach, the couple's resources can be protected for the benefit of the community spouse to the extent necessary to ensure that the community

spouse's total income, including income generated by the CSRA, meets the community spouse's minimum monthly maintenance needs allowance; the fact that additional income from the institutionalized spouse may be or could be made available for the community spouse is not considered.

The Department of Health and Human Services (HHS) has stated in policy memoranda and letters that 42 U.S.C. 1396r-5(e)(2)(C) authorizes consideration of potential income transfers from the institutionalized spouse to the community spouse, so that States may adopt the income-first method or apply some other reasonable interpretation of the law until HHS issues final regulations addressing the issue. Pet. App. 78a-90a. Cf. *Cleary* v. *Waldman*, 167 F.3d 801, 806-807 (3d Cir.) (upholding income-first methodology), cert. denied, 528 U.S. 870 (1999); *Chambers* v. *Ohio Dep't of Human Servs.*, *supra* (same). By statute, the State of Wisconsin has adopted the income-first method, consistent with HHS's interim policy guidance. Wis. Stat. Ann. § 49.455(8)(d) (West 1997); Pet. App. 76a.

3. Two years after respondent Irene Blumer was admitted to a nursing facility in 1994, she applied for Medicaid through her husband, Burnett Blumer. The Green County Department of Human Resources concluded that, as of respondent's institutionalization in 1994, the couple had $145,644 in assets; accordingly, it calculated a community spouse resource allowance for Mr. Blumer of $72,822, which was half the couple's total assets. Respondent, as the institutionalized spouse, was permitted to retain only $2000 in assets. The County determined that, as of the date of respondent's 1996 application, the couple's assets totaled $89,335. That was approximately $14,500 above the eligibility threshold of $74,822 ($72,822 for Burnett Blumer under his CSRA, and $2000 for respondent). Pet. App. 24a-25a; see also *id.* at 2a.

Respondent sought a fair hearing from the Division of Hearings and Appeals of the Wisconsin Department of

Health and Family Services pursuant to 42 U.S.C. 1396r-5(e)(2)(C). The hearing examiner concluded that, if income of the institutionalized spouse (respondent) were excluded from consideration, Mr. Blumer's total monthly income would be $1702.45, approximately $25 below the minimum monthly maintenance needs allowance of $1727. Pet. App. 25a, 30a; see also *id.* at 2a-3a. Accordingly, respondent argued that, under 42 U.S.C. 1396r-5(e)(2)(C), the CSRA should be raised to generate the $25 per month in additional income for Mr. Blumer. Increasing the CSRA would permit the couple to retain additional assets without rendering respondent ineligible for Medicaid. Pet. App. 3a.

Consistent with Wisconsin law and HHS's interim guidance, however, the hearing examiner determined whether there was other income available to support Mr. Blumer and thus to meet his minimum monthly maintenance needs. He concluded that respondent had income of $1262.71, and that the couple's combined income therefore exceeded $2900. Pet. App. 30a-31a. Using the income-first method required by Wisconsin law, the hearing officer found that Mr. Blumer's income could be raised to the minimum monthly needs level by allocating $25 per month to him from his institutionalized spouse, respondent. *Id.* at 31a; see also *id.* at 3a. Accordingly, the hearing examiner declined to increase the CSRA. *Id.* at 31a-32a. The effect of the decision was to defer respondent's eligibility for Medicaid until the $14,500 in excess resources were exhausted (on respondent's care, on meeting Mr. Blumer's needs, or otherwise).

Respondent appealed, and the Green County Circuit Court affirmed the decision of the State agency, rejecting respondent's contention that Wisconsin's income-first method conflicted with the federal statute. Pet. App. 19a-22a.

4. The Wisconsin Court of Appeals reversed. Pet. App. 1a-17a. In its view, Section 1396r-5(e)(2)(C) unambiguously mandates the resource-first method, *i.e.*, that the community spouse's resource allowance must be adjusted upward to

generate sufficient income to meet the minimum monthly maintenance needs allowance, without considering whether or to what extent income is available or could be allocated from the institutionalized spouse. *Id.* at 11a. The court found support for its reading of the statute in the provisions indicating that the CSRA adjustment occurs as a pre-eligibility determination, *id.* at 12a-14a, and from the overall policy of the spousal impoverishment provisions, *id.* at 14a-16a. The Wisconsin Supreme Court denied the State's petition for discretionary review. *Id.* at 18a.

DISCUSSION

In the decision below, the Wisconsin Court of Appeals invalidated a Wisconsin state statute, holding that the spousal impoverishment provisions of the Medicaid program unambiguously preclude the use of an "income-first" methodology. We agree with the State that the decision of that intermediate state appellate court is incorrect; that it conflicts with the decisions of two federal courts of appeals and the decisions of the highest courts of two other States, all of which have upheld methodologies like the one chosen by Wisconsin; and that the case concerns a matter of substantial importance.

Nonetheless, we do not believe that review of the issue by this Court is warranted at this time. The United States Department of Health and Human Services has informed us that, in light of the Wisconsin Court of Appeals' invalidation of the income-first rule on a state-wide basis, it plans promptly to promulgate regulations addressing the question presented here. See also Uniform Agenda, 65 Fed. Reg. 73,838, 73,839 (Nov. 30, 2000). Given the traditional deference this Court accords to agency regulations implementing a statutory scheme entrusted to the agency for administration, HHS's regulations will be of substantial assistance in the interpretation of this complex statutory scheme. Indeed, because Congress has expressly delegated standards-pre-

scribing authority—*i.e.*, it has delegated not merely interpretive but legislative rulemaking authority—to the Secretary in this area, the Secretary's regulations may prove to be central to the full consideration and dispositive resolution of the issue. Finally, the new regulations could altogether eliminate any need for review by this Court: If those regulations continue to authorize the income-first approach, the State may ask the Wisconsin Court of Appeals to revisit the issue; if that court declines to do so, the Wisconsin Supreme Court may choose to review the issue at that time, and then bring the law of that State in line with the Secretary's regulations and the decisions of the other appellate courts that have considered the matter. In analogous circumstances in the past, the Court has deferred review pending the issuance of agency regulations. See, *e.g.*, *Batterton* v. *Francis*, 432 U.S. 416, 421 (1977). We urge the Court to take the same course here.

1. This case concerns the legality of Wisconsin's methodology for determining Medicaid eligibility under that program's spousal impoverishment provisions, 42 U.S.C. 1396r-5 (1994 & Supp. IV 1998). Under Section 1396r-5(e), States must increase a community spouse's resource allowance (CSRA) if such an adjustment is necessary to ensure that the community spouse's total monthly income meets the minimum monthly maintenance allowance. Adjusting the CSRA, in effect, increases the total amount of resources the couple can retain without rendering the institutionalized spouse ineligible for Medicaid; the additional income generated by those extra resources can then be used to meet the community spouse's monthly needs. Like many other States, Wisconsin has decided that, when determining whether the income available to the community spouse falls short of the minimum monthly maintenance needs allowance, the community spouse's income should include any excess income from the institutionalized spouse that could be made available to the community spouse. Two federal courts of

appeals have upheld that methodology, which is known as "income first," as permissible,[2] as have the highest courts of two other States.[3] Disagreeing with those decisions, Pet. App. 10a, the Wisconsin Court of Appeals in this case held that the income-first methodology is foreclosed by the statute. *Id.* at 11a-12a.

In so holding, the Wisconsin Court of Appeals created a conflict on a matter of substantial importance. From the State's perspective, the fiscal impact is potentially large. Respondents do not dispute that the cost to the State of Wisconsin is more than $2 million per year (Br. in Opp. 3), and Wisconsin estimates that the annual cost is approximately $10 million per year (Pet. 20); because the federal government reimburses certain Medicaid expenses, much of that cost will be borne by the national government. Moreover, consistent with the Secretary's informal guidance, a majority of States currently use the income-first method the Wisconsin Court of Appeals invalidated.[4] Finally, for individual Medicaid claimants and their families, the method under which income (and thus Medicaid eligibility) is determined can have a profound impact on their financial decisions.

The decision of the court of appeals, holding that the statute unambiguously forbids the use of the income-first methodology, is also incorrect. The court of appeals rested

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[2] *Cleary* v. *Waldman*, 167 F.3d 801 (3d Cir.), cert. denied, 528 U.S. 870 (1999); *Chambers* v. *Ohio Dep't of Human Servs.*, 145 F.3d 793, 799 (6th Cir.), cert. denied, 525 U.S. 964 (1998).

[3] *Golf* v. *New York State Dep't of Soc. Servs.*, 697 N.E.2d 555 (N.Y. 1998); *Thomas* v. *Commissioner of the Div. of Med. Assistance*, 682 N.E.2d 874 (Mass. 1997).

[4] We have been informed by the Health Care Financing Administration that its own informal survey suggests that some States that currently use the income-first methodology were omitted from the list provided at Pet. 9 n.8, and that some States listed may not use that methodology. In all events, however, a majority of States currently use the income-first method.

its decision on the fact that Section 1396r-5(e)(2)(C) "very specifically directs the increase" of the community spouse's resource allowance "to an amount sufficient to generate additional income to meet" the community spouse's minimum monthly maintenance needs allowance. Pet. App. 11a. It is true that subsection (e)(2)(C) directs the agency to determine whether the community spouse's income meets his or her minimum monthly maintenance needs. And that provision also declares that, if the community spouse's income falls short of meeting those needs, the CSRA should be increased by an amount that will generate sufficient income to bring the community spouse's income to the minimum monthly maintenance needs level. But those evident features of the subsection do not resolve what may be considered income of the community spouse in the first place, when deciding whether or not the community spouse has sufficient income to meet his or her minimum monthly maintenance needs. As one court has explained, the view adopted by the Wisconsin Court of Appeals fails to confront the question whether "a community spouse's 'income' includes—or does not include—any transfer of income from the institutionalized spouse." *Chambers* v. *Ohio Dep't of Human Servs.*, 145 F.3d 793, 799 (6th Cir.), cert. denied, 525 U.S. 964 (1998). "Whether this transferred income is included distinguishes the two possible approaches used to implement subsection (e)(2)(C)." *Ibid.*

On *that* issue—what constitutes income available to the community spouse for purposes of initial eligibility determinations—the spousal impoverishment provisions are silent. Indeed, while those provisions very specifically prohibit the *community spouse's income* from being "deemed" available for the care of the *institutionalized spouse*, 42 U.S.C. 1395r-5(b)(1), they nowhere preclude the Secretary or the States from considering the *institutionalized spouse's income* from being considered available to the *community spouse*. In light of that omission, the most

natural inference is not that Congress intended to prohibit the community spouse's income from including excess income of the institutionalized spouse; instead, it is that Congress intended to allow that practice, or at least left the propriety of that practice to be determined "in accordance with standards prescribed by the Secretary," 42 U.S.C. 1396a(a)(17). *Cf. Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

Nor was the Wisconsin Court of Appeals correct to rely on the statute's provisions concerning certain resource and income allocation procedures at particular stages of the administrative process. That court held that, because the CSRA is calculated before eligibility is determined (it is a "pre-eligibility" determination), income from the institutionalized spouse should not be treated as income of the community spouse at that stage. In that regard, the court noted that the statute addresses the question of allocation of the institutionalized spouse's income to the community spouse in connection with the State's determination—post-eligibility —of how much of the institutionalized spouse's income can be applied to the monthly cost of care, see 42 U.S.C. 1396r-5(d)(2), and the court inferred from that provision that any similar allocation at the pre-eligibility stage is prohibited. Pet. App. 12a-14a. That inference is hardly ineluctable. It is just as plausible to read the pre- and post-eligibility methodologies in harmony with each other, such that the institutionalized spouse's excess income may be treated as income available to the community spouse pre-eligibility to the extent permitted under standards promulgated by the Secretary, in the same manner that such income must be allocated to the community spouse post-eligibility as provided in Section 1396r-5(d)(2). In other words, the fact that the statute expressly provides for an income allowance from the institutionalized spouse post-eligibility does not bar the Secretary from permitting a parallel allowance to be considered in calculating the community spouse's income

pre-eligibility. As one court of appeals explained, the "distinction between the resource allowance and the income allowance does not * * * address—or limit—the issue of whether a transfer of income may be considered when a community spouse resource allowance adjustment is contemplated under § 1396r-5(e)(2)(C)." *Chambers*, 145 F.3d at 802.

Finally, the Wisconsin Court of Appeals' decision is inconsistent with the legislative history of the 1988 amendments. Addressing the very provision at issue here, the Conference Report declared:

> If the State, after such a hearing, determines that the community spouse resource allowance is inadequate, the State must allow the community spouse to retain an adequate amount of resources to provide the minimum monthly maintenance needs allowance (*taking into account any other income attributable to the community spouse*), notwithstanding the amount of the State-established resource allowance.

H.R. Conf. Rep. No. 661, 100th Cong., 2d Sess. 265 (1988) (emphasis added). Thus, in contradiction with the inference drawn by the Wisconsin Court of Appeals, the Conference Report demonstrates that Congress understood that there might be "other income attributable to the community spouse" that can be considered when determining whether to raise the CSRA.

2. Notwithstanding the foregoing, the Court should not grant the petition for a writ of certiorari. At the time the court of appeals decided this case, the Department of Health and Human Services had issued—and the States were operating under—the Secretary's interim guidance. Under that guidance, States had "the option to use the 'income first' rule or to apply some other reasonable interpretation of the law *until* [the Health Care Financing Administration (HCFA)] issue[s] final regulations which specifically address this issue." Pet. App. 86a (emphasis added). We have been

informed that, in light of the state court of appeals' construction of the statute, and its invalidation of the income-first rule on a state-wide basis, HCFA has determined to issue regulations addressing the issue presented by this case on an expedited schedule. In particular, HCFA intends to issue a notice of proposed rulemaking within 90 days.

Those new regulations could significantly affect not only the nature of the question before the Court—and inform this Court's resolution of that question—but also whether the Court's resolution of that issue is necessary at all. Because the statute is technical and complex, the agency's views, as embodied in final regulations, are of considerable importance here. *Aluminum Co. of Am.* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984). Indeed, this case concerns the Social Security Act, notorious for being "almost unintelligible to the uninitiated." *Friedman* v. *Berger*, 547 F.2d 724, 727 n.7 (2d Cir. 1976) (Friendly, J.), cert. denied, 430 U.S. 984 (1977). Even when compared to the rest of the Social Security Act, the spousal impoverishment provisions of the Medicaid program are particularly intricate; the officials who must oversee their implementation on a daily basis consider them to be "extremely complicated" and, "in places[,] ambiguous and incomplete." Pet. App. 84a. The Court should not undertake the difficult task of interpreting this inordinately complex statutory scheme without the benefit of the Secretary's final views.

In this context, moreover, the Secretary's regulations could prove not merely helpful or important, but rather central to determining the validity of state implementing legislation. The Social Security Act at various points accords the Secretary quasi-legislative standards-setting authority on income-attribution issues. Section 1396a(a)(17), for example, provides that state plans must "provide for taking into account only such income and resources as are, *as determined in accordance with standards prescribed by the*

Secretary, available to the applicant or recipient." 42 U.S.C. 1396a(a)(17)(B) (emphasis added). This Court has recognized that Congress, by using such language, "expressly *delegate[s]* to the Secretary the power to prescribe standards" for purposes of determining eligibility, and thus to adopt "regulations with legislative effect." *Batterton* v. *Francis*, 432 U.S. at 425. "In a situation of this kind, Congress entrusts * * * the primary responsibility for" providing content to the statute "to the Secretary, rather than to the courts," *ibid.*, and the regulations are "entitled to more than mere deference or weight," *id.* at 426.[5] See also *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 43-44 (1981) (Secretary's regulations under Section 1396a(a)(17) are entitled to "legislative effect"); *Chevron*, 467 U.S. at 843-844 (explaining that, where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision" and the resulting "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute," but that, where the delegation is merely implicit, the agency's construction controls if it is "reasonable").

In addition, although HHS's interim guidance allows the States the option of using income-first or other reasonable methodologies, the Secretary's final regulations could differ from the interim guidance. They could require the use of income first. But they also could mandate resource first, or continue the Secretary's policy of giving the States a choice among reasonable options. See *Batterton* v. *Francis*, 432 U.S. at 421-422, 429-432 (holding that, where the statute

[5] *Batterton* v. *Francis* concerned a (now repealed) provision of the Social Security Act, 42 U.S.C. 607(a) (1994), with nearly identical language. Section 607(a) provided benefits for dependent children who (among other things) have "been deprived of parental support or care by reason of the unemployment (*as determined in accordance with standards prescribed by the Secretary*) of [their] father." See 432 U.S. at 418 n.2, 419 (emphasis added).

permits the Secretary to "prescribe standards," the Secretary may accord States a reasonable range of options). Until the Secretary issues the final regulations, inquiry into whether any particular implementation of the spousal impoverishment provisions is consistent with statutory text would seem premature and potentially advisory.

Finally, the Secretary's issuance of new regulations could render this Court's review unnecessary. It is possible that the Wisconsin Court of Appeals will, even after the Secretary's issuance of regulations, decline to reconsider its decision. That court, after all, rejected the State's plea for deference to the Secretary's interim policy in part on the ground that Wisconsin courts "do not look to other sources to interpret a statute if its language is clear on its face." Pet. App. 16a.[6] The Wisconsin Court of Appeals, however, is not

[6] The Secretary's regulations, of course, cannot create ambiguity where there is none. Nonetheless, the Wisconsin Court of Appeals also declined deference on the ground that HHS "has not interpreted the statute consistently." Pet. App. 16a. Presumably, the Wisconsin Court of Appeals was alluding to *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), which indicates that the weight federal courts give to a statutory interpretation issued by the administering agency "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Cf. *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). The Wisconsin Court of Appeals' claim of inconsistency, however, is without merit. The agency's initial policy statement regarding 42 U.S.C. 1396r-5(e)(2)(C), issued in November 1993, indicated that it was "requiring that the institutionalized spouse must first make available the maximum amount of income he or she can as a community spouse monthly income allowance under [42 U.S.C. 1396r-5(d)(1)(B)] before being allowed to raise the [CSRA]." Pet. App. 81a. Later, on March 3, 1994, HCFA's Director issued a memorandum, stating that the November 1993 memorandum should not be read as *requiring* the income-first method. *Id.* at 85a, 88a. Rather, the agency sought to give the States "the option to use the 'income first' rule or to apply some other reasonable interpretation of the law until we have issued final regulations which specifically address this issue." *Id.* at 86a. Thus, HHS has never departed from its view that Congress intended that the States should be permitted to use an income-

that State's highest court; the Wisconsin Supreme Court is. That court may well choose to review this issue if, following the Secretary's issuance of regulations, the state court of appeals adheres to its current position; the policies governing that court's exercise of its power of discretionary review strongly suggest such a result.[7] In any event, if the Wisconsin state courts do not bring the law of that State into conformity with the decisions of the federal courts of appeals and the highest courts of other States—or if the Wisconsin courts invalidate the Secretary's regulations—this Court will have ample opportunity to resolve the resulting conflict, and to do so with the benefit of the Secretary's regulations.

The Court followed a similar course in *Batterton* v. *Francis*, *supra*. In that case, the Court initially declined to review, on the merits, a decision of a three-judge panel that

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first method. Rather, the agency has merely indicated that, in view of the ambiguity in the statute, the federal government would pay the resulting federal share of Medicaid benefits to States using either the resource-first method or the income-first method, without challenging those States' practices, in the absence of agency regulations. Cf. *Lincoln* v. *Vigil*, 508 U.S. 182 (1993); *Heckler* v. *Chaney*, 470 U.S. 821 (1985). Besides, even inconsistency is no basis for stripping the agency's view of its "power to persuade." *Skidmore*, 323 U.S. at 140. Unduly weakened deference creates a risk of chaotic, inconsistent rulings in programs governing federal health, safety, and welfare programs that could overtax this Court's supervisory capacity. See, Peter L. Strauss, *One Hundred Fifty Cases Per Year*, 87 Colum. L. Rev. 1093 (1987). This consideration becomes especially important with respect to federal statutes that are administered by the States. *Skidmore* and *Christensen* require more respectful analysis of the agency's views than the peremptory treatment accorded by the Wisconsin Court of Appeals.

[7] Under those policies, the Wisconsin Supreme Court will review cases presenting substantial and novel legal issues, particularly where there is a conflict among courts of appeals or, where the decision is consistent with earlier precedent, "changing circumstances" make the opinions "ripe for reexamination." See App., *infra*, 2a. The Secretary's issuance of comprehensive final regulations construing the federal statute, if they are inconsistent with the state appellate court's view of that statute's meaning, should qualify as a change in circumstances warranting re-examination of the court of appeals' holding.

had invalidated a state Social Security regulation as inconsistent with federal regulations. "Although [the federal agency] did not agree" that the state policy was inconsistent with its regulations, "the Solicitor General, in his memorandum for the United States as *amicus curiae*, filed * * * at this Court's invitation, 408 U.S. 920 (1972), suggested a summary affirmance * * * in light of the then-forthcoming revision of the [agency] regulation," 432 U.S. at 421, and this Court in fact summarily affirmed that decision, *Davidson* v. *Francis*, 409 U.S. 904 (1972). Later, after the district court declined to reconsider its decision in light of the new regulations and was affirmed by the court of appeals, this Court granted certiorari and resolved the dispute, which by then was substantially altered. Indeed, it seems fair to say that, under the Court's analysis, see 432 U.S. at 426-427, the Secretary's regulations proved central to the resulting decision. Similar considerations here counsel a similar course —*i.e.*, deferring review of the issue pending the Secretary's issuance of final regulations.[8]

We recognize, of course, that deferring review of this issue even temporarily imposes a financial burden on the State of Wisconsin and on the federal government, which reimburses the States for a portion of their costs. In

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[8] The analogy to *Batterton* v. *Francis*, of course, is not perfect. In this case, the Wisconsin Court of Appeals held that the Medicaid *statute* unambiguously precludes the use of an income-first methodology; the decision this Court summarily affirmed in *Francis* held that a federal *regulation* precluded the state policy at issue. Nonetheless, the Secretary's forthcoming regulations are likely to prove as important to the Court's resolution of the issue here as they did in *Francis*. First, to the extent Congress delegates standards-setting authority to the Secretary, as under 42 U.S.C. 1396a(a)(17), the Secretary's regulations setting forth those standards are critical if not indispensable to the meaningful judicial review of state statutes. Second, because the Wisconsin Supreme Court has not reviewed this issue on the merits, the Secretary's new regulations, if they continue to authorize the income-first rule, may persuade that court to review the matter and uphold the state statute; such a decision, by eliminating the conflict, might make review by this Court unnecessary.

addition, pending the Secretary's issuance of regulations and the completion of further judicial review, some beneficiaries in the State of Wisconsin will receive benefits under a court-mandated resource-first rule, while similarly situated individuals in other States are denied benefits under the income-first methodology. The Secretary's interim policy guidance, however, expressly contemplates the possibility that States will use different methodologies—it permits the use of income-first or any other reasonable methodology—pending the Secretary's issuance of final regulations. Moreover, in view of Congress's delegation of standards-setting authority to the Secretary in portions of the Social Security Act, this Court has upheld regulations that authorize States to choose among reasonable methodological options. See, *e.g.*, *Batterton* v. *Francis*, 432 U.S. at 430 (holding that the power to "determine" particular issues "remains with the States," and that "the power to prescribe 'standards' gives the Secretary sufficient flexibility to recognize some local options in determining * * * eligibility"). In any event, because the Secretary's regulations may greatly influence the nature of the question eventually presented to this Court and prove important in its resolution, we believe that the better course is to decline consideration of this issue, for now, pending the Secretary's issuance of regulations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

WEST'S WISCONSIN STATUTES ANNOTATED

CIVIL PROCEDURE

CHAPTER 808. APPEALS AND WRITS OF ERROR

808.10. Review by the supreme court

A decision of the court of appeals is reviewable by the supreme court only upon a petition for review granted by the supreme court. The petition for review shall be filed in the supreme court within 30 days of the date of the decision of the court of appeals.

* * * * *

The [Wisconsin] Supreme Court Order of Nov. 15, 1978 provides:

"This court, having deemed it appropriate for the guidance of the Bar and the general public to set forth the standards it will apply in reviewing petitions to appeal from an adverse decision of the Court of Appeals filed pursuant to sec. 808.10 and Rule 809.62, Stats., and this court noting that granting such petitions is a matter within its sound judicial discretion, hereby adopts the following guidelines, which are neither controlling nor limiting measures of such discretion:

"This court will grant a petition to appeal whenever three or more justices of this court vote to grant such petition and when any one of the following criteria are met:

"A) A real and significant question of federal or state constitutional law is presented.

"B) The petition demonstrates a need for this court to consider establishing, implementing or changing a policy within this court's authority.

"C) A decision by this court will help develop, clarify or harmonize the law and

"1) The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or

"2) The question presented is a novel one, the resolution of which will have state-wide impact; or

"3) The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by this court.

"D) The Court of Appeals' decision is in conflict with controlling opinions of the United States Supreme Court or this court or other Court of Appeals' decisions.

"E) The Court of Appeals' decision is in accord with opinions of this court or the Court of Appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination.

"The above stated guidelines are set forth to indicate what this court considers in reviewing petitions to appeal. It must be emphasized, however, that the presence in a case of any one or any combination of these factors is not an assurance that the petition to appeal will be granted. Nor is the apparent absence of such factors an assurance that the petition will be denied."